Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-389

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

MEMORANDUM OPINION AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 10, 1993; Released: August 10, 1993

By the Commission: Commissioner Barrett concurring and issuing a statement: Commissioner Duggan issuing separate statement.

Comment Date: August 31, 1993
Reply Comment Date: September 10, 1993

I. INTRODUCTION

1. In the Memorandum Opinion and Order portion of this document, we address petitions for a stay of the Commission's cable television rate regulation rules.[1] Those rules are scheduled to take effect September 1, 1993. Petitioners ask the Commission to stay the rules until after the Commission resolves pending petitions for reconsideration and completes a parallel rulemaking concerning complementary cost-of-service standards, or, in the alternative, until judicial review is complete.[2] To

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[1] Petition for Stay of InterMedia Partners (filed July 28, 1993); Petition for Stay of the Coalition of Small System Operators, Prime Cable of Alaska, L.P., and the Community Antenna Television Association, Inc. (filed July 28, 1993) (hereinafter referred to as "the Coalition"); Request of Century Communications Corp. for Stay of Effective Date Pending Reconsideration or, in the Alternative, Judicial Review (filed August 2, 1993).

[2] We note that the relief petitioners seek is unaffected by the Commission's decision to move the effective date of the rules from October 1, 1993, to September 1, 1993. See para. 7, infra.

the extent that petitioners request a universal stay of the rules for all cable systems, we deny the petitions. As discussed below, we conclude that petitioners have failed to meet the standards for such a broad stay. In particular, they have failed to demonstrate that the industry will suffer irreparable harm if a stay is not granted.

2. Nevertheless, we have decided that a limited, temporary stay of the rules with respect to small cable systems would serve the public interest. Therefore, we temporarily stay the effectiveness of our cable television rate regulation rules with respect to cable systems "that have 1,000 or fewer subscribers."[3] This limited stay will remain in effect until the effective date of the Commission's order on reconsideration addressing issues concerning the "administrative burdens and cost of compliance" for small cable systems.[4] Thus, we grant the petitions to the limited extent they request a stay of the cable television rate regulation rules with respect to small cable systems. We emphasize that the temporary, limited stay does not apply to cable operators that are outside the statutory definition of small cable systems, that is, those systems that have more than 1,000 subscribers. Thus, for those cable systems that do not meet the definition of "small system" contained in the Cable Act of 1992, the rate regulation rules will take effect September 1, 1993.

3. Finally, we issue a Further Notice of Proposed Rulemaking to supplement the record to facilitate our review of the application of the cable rate rules to small systems. Specifically, we seek comment on whether, in modifying our rules to reduce the administrative burdens and costs of compliance for small systems, those cable systems that are affiliated with and controlled by a multiple system operator ("MSO") should be afforded the same level of relief as small, independently owned cable systems.

II. BACKGROUND

4. The Commission's rate regulation rules implement provisions of the Cable Television Consumer Protection and Competition Act of 1992.[5] The Commission adopted the rules in a

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Thus, we do not address issues related to that decision.

[3] Communications Act, Section 623(i), 47 U.S.C § 543(i).

[4] Id.

[5] Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992), amending Sections 623, 612 and 622(c) of the Communications Act of 1934, 47 U.S.C. §§ 543, 532 and 542(c) ("Cable Act of 1992").

Report and Order released May 3, 1993, in this docket.[6] The Commission established as its primary method of regulation a system of competitive benchmarks and price caps to determine the reasonableness of rates for those cable systems subject to rate regulation. The benchmark and price cap methodology was designed to achieve the statutory goal of ensuring reasonable rates for cable service[7] while at the same time avoiding the substantial burdens of traditional, cost-based rate regulation.[8]

5. In addition, the Report and Order specifically established an opportunity for cable operators to justify rates above benchmark levels based on the costs of providing regulated cable service. The Commission announced its commitment to adopt on an expedited basis specific standards governing optional cost-of-service showings by cable operators in a parallel rulemaking proceeding.[9] Pending the adoption of specific rules, the Commission stated that regulators will review cost-of-service showings by cable operators on a case-by case basis pursuant to general cost-of-service standards.[10]

6. The Report and Order established June 21, 1993, as the effective date of the new rules. Subsequently, the Commission on its own motion deferred the effective date of the rules until

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[6] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177 (released May 3, 1993), 58 Fed. Reg. 29736 (May 21, 1993) ("Report and Order").

[7] See Communications Act, Section 623(b)(1), 47 U.S.C. § 543(b)(1). See also Communications Act, Section 623(c)(1)(A), 47 U.S.C. 543(c)(1)(A) (Commission to prescribe criteria for identifying rates for cable programming services that are unreasonable).

[8] See Communications Act, Section 623(b)(2)(A), (B), 47 U.S.C. § 543(b)(2)(A), (B) (Commission directed to prescribe rules that seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities and the Commission; Commission may adopt formulas or other mechanisms and procedures in complying with this directive).

[9] Report and Order, at paras. 262-64, 270-72. The Commission subsequently issued a Notice of Proposed Rulemaking regarding cost-of-service standards. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 93-215, FCC 93-353 (released July 16, 1993), 58 Fed. Reg. 40762 (July 30, 1993) ("Cost-of-Service NPRM").

[10] Report and Order, at para. 272; Cost-of-Service NPRM, at n.9.

October 1, 1993.[11] The Commission explained that a severe budget shortfall for Fiscal Year 1993 and delay and uncertainty in securing a supplemental appropriation made it infeasible to fully implement the rules on June 21st and necessitated approximately a three-month deferral of cable rate regulation.[12]

7. Shortly thereafter, Congress passed an $11.5 million supplemental appropriation for Fiscal Year 1993 to aid the Commission in discharging its new responsibilities under the Cable Act of 1992. After the supplemental appropriation became law, the Commission on its own motion reconsidered the October 1, 1993, effective date of the rules. In an Order released July 27, 1993, the Commission determined that the infusion of supplemental funds would enable it to implement cable rate regulation on a slightly more expedited basis.[13] Accordingly, the Commission advanced the effective date of the rules one month to September 1, 1993.

III. DISCUSSION

A. Memorandum Opinion and Order

1. Legal Standard for Evaluating Petitions for Stay

8. The Commission evaluates petitions for stay under well-settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[14]

9. A concrete showing of irreparable harm is an essential factor in any request for stay.[15] The courts have required a stringent standard of proof on this issue, stressing that "the

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[11] Order, MM Docket No. 92-266, FCC 93-304 (released June 15, 1993), 58 Fed. Reg. 33560 (June 18, 1993) ("Deferral Order").

[12] Id., at para. 2.

[13] Order, MM Docket No. 92-266, FCC 93-372 (released July 27, 1993), 58 Fed Reg. 41042 (Aug. 2, 1993) ("July 27 Order").

[14] Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985 (per curiam); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc. 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C Cir. 1958).

[15] Reynolds Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir. 1985); Wisconsin Gas, 758 F.2d at 674.

injury must be both certain and great; it must be actual and not theoretical. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur."[16] When, as in this case, the alleged harm has not yet occurred, the petitioners must provide proof indicating that the injury "is certain to occur in the near future."[17] Moreover, the harm must "directly result from the action which the movant seeks to enjoin."[18]

2. The Request for a Universal Stay for All Cable Systems

10. The petitions do not limit the requested relief to any particular cable system or class of systems. Rather, they request a universal stay of the rules with respect to all cable systems nationwide. Judged against the standards described above, petitioners have not met their burden for justifying such broad relief. In particular, petitioners have not demonstrated that the cable industry will be irreparably harmed if the effective date of the rules is not delayed until after the petitions for reconsideration and the pending cost-of-service rulemaking are completed or judicial review is complete.

11. Petitioners first state that many cable operators have current rates that exceed the relevant benchmark. Petitioners allege that, in some cases, reducing rates to comply with benchmark levels: (1) could result in lost revenue or increase losses currently being incurred by some cable operators; (2) could cause violations of loan covenants with respect to cash flow requirements that might result in foreclosure by lenders and bankruptcy proceedings for operators; (3) might impair the ability of operators to obtain bank financing in the future; and (4) might deprive operators of sufficient funds to implement system upgrades or improve and expand service as required by some franchise agreements, thereby raising the specter of revocation of the franchises by local franchising authorities and the potential destruction of the business. Petitioners suggest that rates that produce such potential consequences would be confiscatory.

12. These arguments are speculative and hypothetical, even assuming that the benchmark methodology -- rather than the cost-of-service option -- is the ratemaking approach that would be applied in all cases. The proffered evidence does not demonstrate that specific rates set pursuant to the relevant benchmark would result in confiscation. Petitioners in essence

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[16] Wisconsin Gas, 758 F.2d at 674 (emphasis in original).

[17] Id.

[18] Id.

challenge the Commission's general benchmark and price cap methodology, not a specific set of rates derived under that methodology. Thus, petitioners have not made a concrete showing that the benchmark as applied in any specific franchise area will in fact prove inadequate to allow the cable operator to attract capital and earn a return commensurate with that of enterprises facing comparable risk, which is the standard for confiscation.[19] See Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968) (upholding agency denial of stay of general area-wide rate order pending disposition of petitions for special relief where court had "no reason now to believe that it would in all cases" be "an abuse of discretion," noting that "there might be many situations in which a stay would be inappropriate. . . ."). Nor have petitioners provided concrete proof that any of the alleged harms listed above are "certain to occur" in the near future.[20] For example, there is no specific proof that any franchising authority will in fact revoke a particular cable operator's franchise for a purported inability to satisfy franchise requirements regarding system upgrades and expansion of service allegedly resulting from a rate set pursuant to the benchmark. Nor is there any specific evidence that a bank will in fact foreclose on a loan of a particular cable operator if cash flows are affected by rates set at benchmark levels. Rather, petitioners offer only unsubstantiated and hypothetical allegations of harm that may occur once rate regulation begins. This showing is insufficient to justify a universal, industry-wide stay of rate regulation.

13. In any event, if rates determined pursuant to the benchmark are inadequate in specific circumstances, cable operators are free to maintain existing rates above the benchmark, or to raise future rates above the benchmark, on the basis of a cost-of-service showing tied to their own specific costs pending evaluation of that showing by regulators.[21] Such a cost-of-service showing could be used to avoid the alleged harms about which petitioners speculate.[22]

14. Petitioners' claim that they are unable to avail themselves of the cost-of-service option because the Commission has not yet adopted specific rules to govern cost-of-service showings is without merit. This position assumes that the

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[19] See FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944); Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (en banc).

[20] Wisconsin Gas, 758 F.2d at 674.

[21] Report and Order, at para. 272.

[22] See para. 11, supra.

Commission will not take actions consistent with minimum statutory and constitutional standards that necessarily would govern the Commission's (and local franchising authorities') evaluation of any cost-of-service showing. Although comprehensive cost-of-service rules have not yet been adopted, the statutory standard of "reasonable" rates, which ultimately would govern such rules, is sufficiently concrete to protect the interests of both cable operators and subscribers in the interim.[23] Under established ratemaking principles, the lowest reasonable rate is one that is not confiscatory in the constitutional sense.[24] A just and reasonable, nonconfiscatory rate should be "sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital."[25] The rate should also be "commensurate with returns on investments in other enterprises having corresponding risks."[26]

15. The Commission's regulatory scheme recognizes these constitutional and statutory commands. To the extent that the Commission's primary method of competitive benchmarks and price caps may be inadequate when applied in individual circumstances, the Commission has given assurance that it will permit cable operators an opportunity to demonstrate the reasonableness of higher rates based on costs and to charge existing higher rates based on these costs until a ruling is made on its cost demonstration. An abundance of case law exists on such fundamental ratemaking issues as which costs properly may be included in the regulated rate base and what constitutes a fair rate of return on investment for regulated entities. The Commission's Cost-of-Service NPRM, as well as its rules and decisions regarding ratemaking issues in the telephone context, offer guidance as well. Thus, as we stated in the Report and Order and the Cost-of-Service NPRM, pending adoption of specific cable cost-of-service rules, cable operators who believe that rates set pursuant to benchmark levels are inadequate as applied in a specific franchise area may seek approval for higher rates from regulators on a case-by-case basis pursuant to general cost-of-service principles. The Commission and local franchising authorities will consider such requests pursuant to governing statutory and constitutional standards.

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[23] Cf. AT&T v. U.S., 299 U.S. 232, 246 (1936) (just and reasonable standard not unreasonably vague).

[24] FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).

[25] Hope, 320 U.S. at 603. This is often referred to as the "capital attraction" standard.

[26] Id. This is often referred to as the "comparable risk" standard.

16. We note that the Commission is moving as expeditiously as possible to address reconsideration petitions and to adopt specific rules to govern cost-of-service showings by cable operators. That the Commission's cost-of-service rulemaking is not yet complete does not in any way diminish a cable operator's opportunity to continue to charge existing above-benchmark rates and to make a cost-of-service showing for those or other above-benchmark rates in the future pending a ruling by regulators. Nor does the pending cost-of-service rulemaking require that rate regulation be delayed until specific rules are adopted. While it would be preferable to have specific rules in place, sufficient standards exist to guide cable operators seeking to make cost-of-service showings during this transitional period.[27] The suggestion by petitioners that the interim standards will be applied inappropriately or in a way that destroys cable operators' opportunity to operate profitably is purely speculative and does not meet the standard for irreparable injury. Of course, if in a specific case a franchising authority (or the Commission) applied general cost-of-service standards in a confiscatory manner, the cable operator could seek an administrative or judicial stay at that time, where a specific factual context would be present.[28]

17. To the extent that the requests for stay are simply a broad attack on rate regulation in general, we note that rate regulation, in and of itself, does not constitute irreparable harm. In crafting our rate regulation rules, we have attempted to balance the interests of subscribers in paying reasonable rates for regulated cable service with the legitimate interests of cable operators in recovering their costs and earning a reasonable profit.[29] However, cable operators are not constitutionally or statutorily entitled to maintain rates established prior to regulation that are based on financial practices, arrangements and expectations existing in an

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[27] See Permian Basin Area Rate Cases, 390 U.S. at 771-72 ("It would doubtless be desirable if the Commission provided, as quickly as may be prudent, a more precise summary of its conditions for special relief [of its general area rate order], but it was not obliged to delay area regulation until such guidelines could be properly drawn.").

[28] See Report and Order, at n.640 (cable operator may request Commission to stay a decision by a local franchising authority to reduce rates based on cost-of-service determinations).

[29] We note that our findings in the context of this action do not foreclose our ability to make future adjustments to the rate regulation mechanisms during reconsideration, in the event we deem it prudent and necessary.

unregulated environment. Neither is there any constitutional or statutory requirement that the Commission's regulatory scheme must enable cable operators to select the option that maximizes their financial position. We conclude that the petitions do not make a sufficient showing that the cable industry will suffer irreparable harm if the rules are not stayed.[30]

18. Finally, we believe it is indisputable that a delay of rate regulation for all cable systems and all subscribers, such as that sought by petitioners, would undercut the congressional mandate that cable rates be regulated and the underlying congressional determination that such rate regulation is in the public interest. In this regard, we note that while Congress did not establish a specific effective date for the cable rate regulation rules, the statutory requirement that the Commission prescribe its rate regulation rules "[w]ithin 180 days after the date of enactment" of the Cable Act of 1992[31] suggests a strong congressional policy in support of expedited implementation. This policy is further supported by language in the Conference Report accompanying the legislation enacting the Commission's supplemental budget appropriation.[32] We thus conclude that a universal stay of our rate regulation rules with respect to all cable systems is not warranted.

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[30] Century's further speculation that application of the Commission's rules threatens to damage its business reputation and customer goodwill falls far short of the concrete showing of irreparable harm necessary to support a stay. Moreover, its argument that the absence of specific cost-of-service rules leaves the Commission and franchising authorities unrestrained discretion in ruling on cost-of-service showings, in violation of due process and the First Amendment, is meritless. The availability of the cost-of-service option -- governed by the constitutional confiscation standard -- refutes any suggestion that petitioner's due process rights are somehow threatened. Similarly, rate regulation (particularly as limited by the constitutional confiscation standard) alone has never been viewed as raising First Amendment issues. In fact, the cable television industry (or segments of that industry) virtually from its inception has been subject to some form of rate regulation. Rate regulation under the Cable Act of 1992 pursuant to content-neutral economic standards does not implicate First Amendment concerns.

[31] Communications Act, Sections 623(b)(2), (c)(1), 47 U.S.C. §§ 543(b)(2), (c)(1).

[32] See 139 Cong. Rec. H4377 (June 30, 1993).

3. Temporary, Limited Stay for Small Cable Systems

19. The Cable Act of 1992 recognizes that rate regulation may present special burdens for small cable systems. Thus, Section 623(i) of the Act provides: "In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[33] In our Report and Order, we attempted to craft our rules with these considerations in mind.[34] Nevertheless, we have received numerous petitions for reconsideration of the Report and Order indicating that our cable rate regulation rules present particularly substantial administrative burdens and compliance costs for small systems that will result in a disproportionate overall burden on these systems.

20. Particularly in light of the clear congressional concern that small cable systems[35] not be subjected to inordinate administrative burdens and costs of compliance, we believe that, on balance, the public interest would be served best by staying our rate regulation rules on a temporary basis with respect to such cable systems.[36] This temporary stay will give us an opportunity to evaluate fully the arguments and proposals currently before the Commission on ways to reduce the administrative burdens and compliance costs that may disproportionately affect small cable systems. Moreover, because systems with under 1,000 subscribers serve only approximately 3.6

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[33] Communications Act, Section 623(i), 47 U.S.C. § 543(i). Such systems constitute 59 percent of all systems but only 3.6 percent of all cable subscribers. See 1993 TV and Cable Factbook Services Volume 61, p. I-69.

[34] Report and Order, at paras. 462-65.

[35] For rate regulation purposes, we determine system size by a system's principal headend, including any other headends or microwave receive sites that are technically integrated to the system's principal headend, rather than on a franchise area basis. Report and Order, at para. 465.

[36] The limited, temporary stay applies to all cable systems that have 1,000 or fewer subscribers, regardless of ownership or affiliation. However, in evaluating how to modify our rules on reconsideration to reduce burdens on small cable systems, we are also seeking comment on whether our rules should distinguish between small, independently owned systems and those affiliated or controlled by an MSO for purposes of implementing Section 623(i). See Further Notice of Proposed Rulemaking, infra.

percent of cable subscribers nationwide,[37] the stay will have only a marginal effect on our overall schedule for cable rate regulation. Accordingly, to the extent that the petitions request this limited relief, we grant the petitions.[38] The stay shall remain in effect until the effective date of the Commission's order on reconsideration addressing the small cable system issue. We intend to resolve this specific issue in the near future.

21. We emphasize that the temporary, limited stay does not apply to cable systems that have more than 1,000 subscribers. The reasons discussed above for granting the limited stay with respect to small cable systems do not apply with equal force to larger cable systems. Congress explicitly singled out small cable systems for special consideration. The record on reconsideration raises serious questions about whether the Commission's rate regulation rules, as currently drafted, may create burdens and costs that are unique to small systems. Thus, we do not stay the effect of the rate regulation rules for those cable systems that are not "small systems" as defined in Section 623(i) of the statute. For systems that have more than 1,000 subscribers, the rate regulation rules will take effect September 1, 1993.

B. Further Notice of Proposed Rulemaking

22. In the Report and Order, we stated that we would apply our small system rules to systems with under 1,000 subscribers, regardless of whether the system is independent or owned by an MSO.[39] In so doing, we declined invitations by certain commenters to draw a distinction between small independently owned cable systems and those small systems that are affiliated with or controlled by large MSOs.[40] We noted that the language

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[37] 1993 TV and Cable Factbook Services Volume 61, p. I-69.

[38] The Coalition's petition, in particular, focuses on the disproportionate impact of the rate regulation rules on small cable systems.

[39] Report and Order, at para. 464.

[40] See, e.g., NATOA Comments at 88 (small systems controlled by large MSOs have a variety of cost advantages, particularly access to programming discounts, and the ability to acquire debt at the favorable rates a large corporation can obtain); USTA Comments at 16-17 (larger MSOs are likely to have greater leverage with respect to local government and to have corporate resources that stand-alone small systems or those operated by smaller MSOs do not have); Northland Comments at 17-18 (large MSOs are likely to enjoy substantial programming volume discounts, discounts on

of the Cable Act does not distinguish between such systems, and that the problems faced by small systems serving smaller, often more rural communities occur whether or not the system is owned by an MSO. We thus declined to presume that large corporate ownership of a small system automatically would make compliance with our rate regulation rules and procedures less costly.[41]

23. Upon further reflection, we have decided to explore further whether any relief that we ultimately may provide to small cable systems should extend to all small systems or only to such systems that are not affiliated with or controlled by large MSOs.[42] In particular, we seek comment on whether we should establish a "subscriber cap" that, with respect to MSO-owned small systems, would limit relief to those systems that are controlled by an MSO having less than a certain number of subscribers in the aggregate. This cap could be set, for example, at one million total subscribers for the MSO, or at some lower or higher figure. We seek comment on the need for such a cap generally, and, if such a cap is warranted, the specific number of aggregate subscribers that would serve as the demarcation point for small system relief for MSO-owned systems.

24. Our previous survey of industry data indicates that, for those small systems responding to the survey, approximately 83 percent are affiliated with an MSO.[43] Thus, for those small systems responding, approximately 17 percent represented independently owned systems. We are interested in gaining more information on the number of independently owned cable systems with fewer than 1,000 subscribers, the number that are affiliated with MSOs, and the size of the parent MSOs. Commenting parties are encouraged to provide detailed information on these issues.

25. We also solicit comment on the generic differences between independent small systems and those small systems affiliated with or owned by MSOs. Specifically, we seek comment

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maintenance and supplies, and are likely to be able to purchase debt at a more favorable rate than smaller MSOs).

[41] Report and Order, at para. 464.

[42] We note that our review of the distinct attributes of small, independently owned cable systems, as compared to those small systems affiliated with large MSOs, will be guided in part by our reconsideration of the rate regulation mechanism, and how it may apply uniquely to small systems. See, e.g., petitions for reconsideration filed by Coalition of Small System Operators, Community Antenna Television Association, Inc.

[43] For purposes of the survey, an MSO was defined as a company with two or more systems.

on whether our rate regulation rules create disproportionate problems for small, independent systems that are not faced to the same degree by MSO-owned small systems. We particularly are interested in comments addressed to the issue of whether small systems owned by MSOs enjoy economies of scale and scope not available to independent small systems. In this regard, we seek comment on the types of cost advantages available to MSO-owned systems, including, for example, volume discounts for programming, favorable rates on debt acquisition, and discounts on equipment, maintenance and supplies. If such economies of scale and scope exist, at what point (i.e., aggregate number of subscribers) do such economies warrant adoption of a subscriber cap for purposes of determining regulatory relief for small systems owned by MSOs? We also seek comment on any incentives that such a cap might create, and conversely, whether the absence of such a subscriber cap could create incentives for the disaggregation of systems to place some systems within the cap. If disaggregation occurs, we also solicit comment on whether the Commission should consider such restructuring an evasion under Section 623(h).

26. Ex Parte Rules -- Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

27. Initial Regulatory Flexibility Analysis. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1980).

28. Reason for action: This Further Notice of Proposed Rulemaking is issued to obtain comment on whether the Commission should distinguish between small independent cable television systems and those small systems affiliated with or owned by an MSO, for purposes of modifying the Commission's cable television rate regulation rules to reduce administrative burdens and cost of compliance for small cable systems.

29. Objectives: To modify existing rules to implement Section 623(i) of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992.

30. Legal Basis: The proposed action is authorized under Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 543.

31. Reporting, record keeping and other compliance requirements: The proposal under consideration in this Further Notice of Proposed Rulemaking may modify reporting and record keeping requirements for cable systems subject to the Commission's rate regulation rules with 1,000 or fewer subscribers.

32. Federal rules which overlap, duplicate or conflict with these rules: None.

33. Description, potential impact, and number of small entities involved: Any rules changes in this proceeding could affect cable systems with 1,000 or fewer subscribers, specifically such systems that are affiliated with or owned by an MSO. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

34. Any significant alternatives minimizing the impact on small entities consistent with stated objectives: The Further Notice of Proposed Rulemaking seeks comment on how to reduce administrative burdens and cost of compliance for cable systems subject to the Commission's rate regulation rules that have 1,000 or fewer subscribers.

35. Paperwork Reduction Act. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

36. Comment Dates. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 31, 1993**, and reply comments on or before **September 10, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications

Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

IV. CONCLUSION

37. We conclude that petitioners have not demonstrated that a universal stay of our cable television rate regulation rules for all cable systems until completion of pending reconsideration petitions and the cost-of-service rulemaking or judicial review is warranted. We grant a temporary, limited stay of the rules with respect to those cable systems that have 1,000 or fewer subscribers until the Commission reconsiders the administrative burdens and costs of compliance with rate regulation on such small cable systems. For all other cable systems, our rate regulation rules will take effect on September 1, 1993. Finally, we seek further comment on the small system issue to assist our review on reconsideration.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, that the petitions for stay filed by InterMedia Partners, and the Coalition of Small System Operators, Prime Cable of Alaska, L.P., and the Community Antenna Television Association, Inc., on July 28, 1993, and Century Communications Corp. on August 2, 1993, ARE GRANTED to the limited extent they seek a stay of the cable television rate regulation rules with respect to cable systems that have 1,000 or fewer subscribers, and otherwise ARE DENIED.

39. IT IS FURTHER ORDERED, that the Commission's cable television rate regulation rules adopted in Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177 (released May 3, 1993), 58 Fed. Reg. 29736 (May 21, 1993) ARE TEMPORARILY STAYED with respect to those cable systems with 1,000 or fewer subscribers. This limited stay shall remain in effect until the effective date of the Commission's order on reconsideration addressing issues concerning administrative burdens and costs of compliance for small cable systems.

40. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Further Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

41. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Further Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (Stay of Rules)

This Memorandum Opinion and Order and Further Notice of Proposed Rulemaking: (1) denies petitions for a universal stay of the cable rate regulation rules; (2) grants a temporary, limited stay of the rules with respect to small cable systems -- defined as those systems with 1000 or fewer subscribers -- until the Commission issues an order on reconsideration to address issues concerning the "administrative burdens and costs of compliance for small cable systems; and (3) seeks additional comment from the public to facilitate our review of how the cable regulations apply to small cable systems.

I concur with this decision. I believe that the temporary stay should focus on small cable systems that truly manifest the attributes and problems associated with small systems.[1] Indeed, this decision is intended to provide limited relief to the extent that small cable systems disproportionately experience administrative burdens and costs of compliance. However, I believe that the record does not clearly indicate that all cable systems with fewer than 1000 subscribers require such relief. Thus, I question whether the definition of "small systems" should apply only to small operators affiliated with multiple system operators (MSOs) where they either represent a significant percentage of the MSO operations, or are independently-owned. Without further evidence, it is not clear to me that small operators affiliated with larger MSOs (i.e., top 30 MSOs with 400,000 subscribers or more) are unable to receive assistance from their corporate parent. Accordingly, I believe that the "small system" definition should impose a subscriber cap on MSOs in order to direct the relief toward those small systems that truly lack the resources to comply with cable rate regulations at this time.

I particularly am concerned that in the absence of an "MSO cap", this decision will affect nearly 5900 of the over 11,000 cable

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[1] Section 623(i) of the 1992 Cable Act directs the Commission to design rate regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers.

systems nationwide, or approximately 59% of all cable systems.[2] I recognize, however, that the Commission's capacity to decide this issue is limited by its own resources and available information. Given the large number of systems affected by this temporary stay, the Commission must be informed as to the number of affected "small systems" that are affiliated with certain MSOs, and the extent to which the affiliated small systems actually experience similar constraints as those without access to the resources of larger MSOs. As a result, I encourage parties to respond to the questions raised in the Further Notice on this issue, and I support the decision to deny petitions for a universal stay of the cable rate regulations.

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[2] See 1993 Television and Cable Factbook, Services Volume 61, p. I-69.

Separate Statement
of
Commissioner Ervin S. Duggan

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation

I support both of the actions that the Commission takes today: denying an across-the-board stay of rate regulation, and granting a temporary, limited stay for systems of 1,000 subscribers or less. I write separately to ensure that no one mistakes the Commission's temporary stay for small systems as a lack of commitment to the task of rate regulation.

The act of bringing temporary relief to small cable systems affects only 3.6 percent of all cable subscribers. More than 96 percent of subscribers will see rate regulation begin on September 1 as scheduled. The overall impact of this decision, therefore, is slight.

Congress, however, specifically gave the Commission these instructions in the 1992 Cable Act: "In developing and prescribing regulations. . . the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."* We provided only minimal relief for small systems in the April 1 Report and Order that launched our rate rules. Since that time, we have received considerable anecdotal evidence--- both on the record, and in trade press accounts--- suggesting that small companies have had a particularly difficult time as they began their efforts to comply with our regulations. Among the hardest-hit appear to be small systems unaffiliated with large, integrated companies (whose resources are presumably adequate to deal with the new rate requirements).

I favor a streamlined, simplified approach to regulation for small systems, as Congress has directed. Moreover, it seems apparent to me

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* 47 U.S.C. Section 543(i).

that any permanent streamlining we consider should probably be narrowly tailored to benefit independent operators most--- particularly the small, rural, mom-and-pop systems for whom the new regulations must seem to be an incomprehensible tangle.

Because my views about permanent relief for small systems are preliminary, I support a request for further comment on the issue. We may well conclude that an "MSO cap" limiting small system relief to the most directly affected operators has merit. I look forward to reviewing the supplemental record we are gathering on this aspect of our rules.

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